

No. 87-1352

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**  
October Term, 1987

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BOARD OF TRUSTEES OF THE UNIVERSITY OF  
ARKANSAS, AND THE CHANCELLOR OF THE  
UNIVERSITY OF ARKANSAS AT PINE BLUFF,

*Petitioners,*

vs.

SYLVESTER LEGRAND and HENRY RAYFUS,

*Respondents.*

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On Petition For Writ Of Certiorari To The  
United States Court Of Appeals For The Eighth Circuit

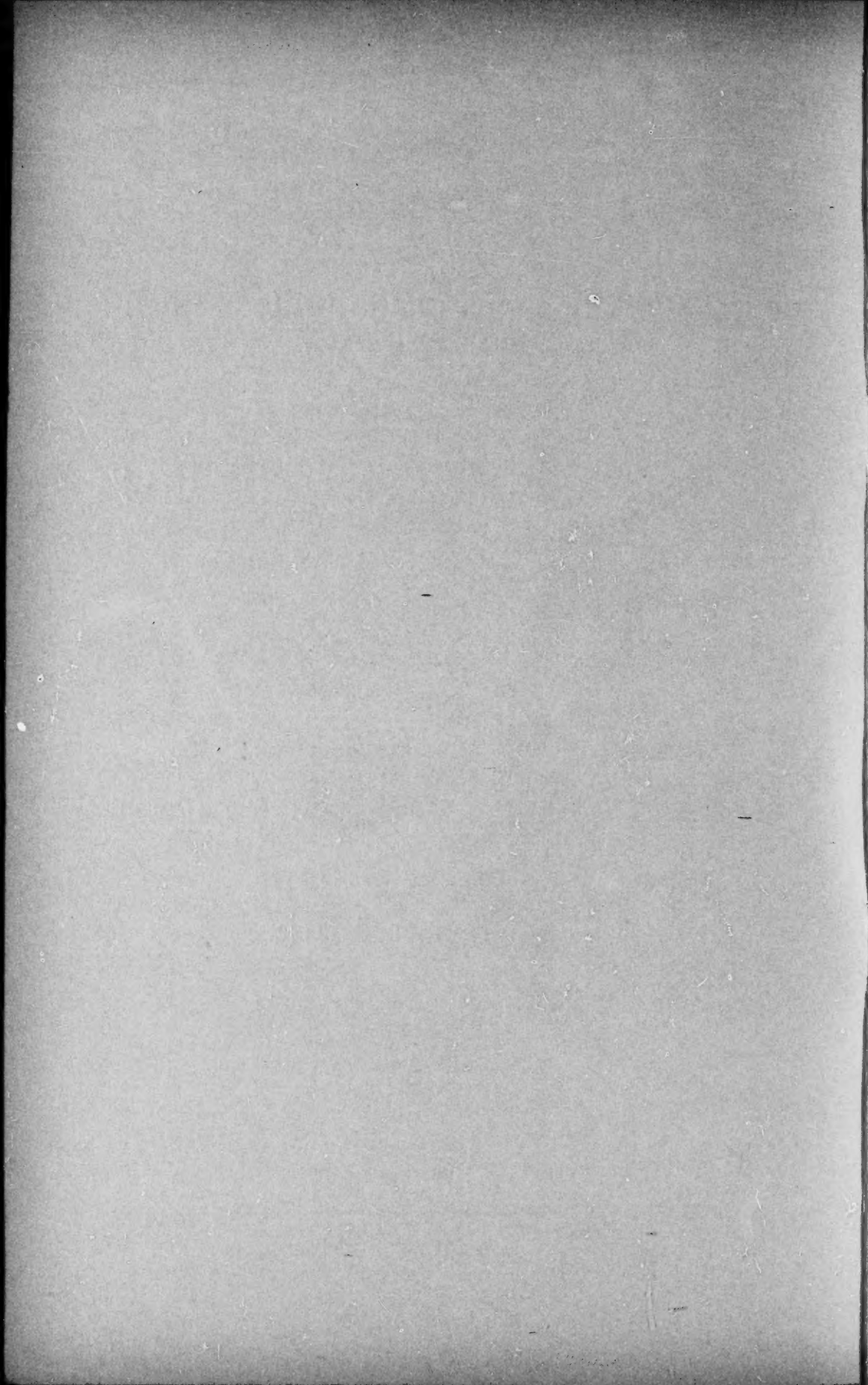
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**BRIEF IN OPPOSITION**

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**STATEMENT OF THE CASE**

This case presents two questions already decided by  
this Court: (a) whether a court of appeals has properly

exercised its powers when reviewing a district court's decision based on incorrect legal principles and clearly erroneous findings of fact and (b) whether the court of appeals correctly held that plaintiffs had established a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Legrand and Rayfus, respondents herein, are black, certified journeyman electricians who were employed on a contractual basis in the electrical department of the Physical Plant at the University of Arkansas at Pine Bluff ("UAPB"). Legrand had worked with UAPB since 1975 and Rayfus since 1974. Both testified at trial that they knew their contracts were subject to renewal every year. The only other employee in the electrical department was their supervisor, Willie Pree, who is also black. As their immediate supervisor, Pree had prepared evaluations of the two for several years.

UAPB's Vice Chancellor Benson Otovo testified that in 1983 the school instituted budget cutbacks. As a result, UAPB slated nineteen positions in the Physical Plant, including one of the two journeyman electrician positions, for elimination. On July 1, 1983,<sup>1</sup> twenty-seven employees who worked in the Physical Plant, including Legrand and Rayfus, learned that their contracts were not being renewed for the fiscal year of 1983-84.

UAPB has asserted various reasons for the nonrenewal of respondents' contracts and their refusal to con-

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<sup>1</sup>The Director of the Physical Plant at this time was Burton Henderson, a white male, who had held that position since March 1, 1983.

sider the respondents for the remaining journeyman electrician position or any other position at the school.<sup>2</sup> Originally, UAPB cited budget cuts as the reason for both nonrenewal and their refusal to rehire. Appendix (App.) at 12, n.6. Only after respondents brought this action did UAPB inform Legrand and Rayfus that “poor performance brought about the discharge as well as the refusal to reemploy them.” App. at 11. On appeal to the Eighth Circuit, UAPB raised a third explanation—the risk of noncompliance with the desegregation directives of *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). The record, however, belies UAPB’s assertion that neither respondents were qualified for “the duties of the single journeyman electrician after the cut-back.” Pet. Br. at 10.

Despite UAPB’s assertion that respondents were unqualified, the record shows that they were veteran, certified electricians. Job evaluations indicate that both Legrand and Rayfus were given scores ranging from average to superior in dependability, responsibility, initiative and work capacity. App. at 10-11. Pree and James Bankston, the Director of the Physical Plant prior to the cut-backs, testified that either respondent was qualified to fill the remaining electrician opening. Pree also testified that he knew of nothing in either respondents’ employment files to cause him not to recommend them. *Id.* at 13. Further, the record contains “minimal evidence” of disciplinary actions against respondents for their allegedly unauthorized absences. *Id.* at 13.

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<sup>2</sup>It is unclear why the trial court solicited evidence of a “legitimate nondiscriminatory reason for discharging plaintiffs” from UAPB if, as the trial court held, respondents had failed to establish a *prima facie* case. App. at 27.

On July 5, 1983, only four days after respondents were laid off, Michael Cummings, a white male, applied for the open journeyman electrician position, and he was hired on a temporary, part-time basis on July 15. At the time, Cummings was a student of James Bankston who recommended Cummings to Pree. On August 25, 1983, Burton Henderson recommended that Cummings be hired permanently. Cummings eventually became supervisor of the electrical department when Pree retired. Neither respondent was informed of, nor considered for, the opening filled by Cummings.<sup>3</sup>

In 1984, the General Assembly of the State of Arkansas appropriated more funds to UAPB. The nineteen positions cut in 1983, including the journeyman electrician job, in the Physical Plant were eventually restaffed. Neither Legrand nor Rayfus was interviewed for these openings.

Legrand and Rayfus brought suit against UAPB in the Eastern District of Arkansas alleging racially disparate treatment in the nonrenewal of their contracts and in the failure to consider them for subsequent openings for which they applied and were qualified.

In its Findings of Fact and Conclusions of Law (App. at 18-27), the District Court dismissed respondents' complaint. The trial court found as fact that "[t]he evidence and testimony presented leads the Court to conclude that *race played no role* in the decision to terminate the plain-

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<sup>3</sup>UAPB officials testified that the selection of Cummings "was made outside any objective recruiting or hiring procedures." App. at 13.



tiffs' contracts or the decision not to rehize the plaintiffs." App. at 24. The trial court held that respondents had failed to establish a prima facie disparate treatment case because (a) black is the "dominant race" at UAPB and (b) neither respondent was qualified for the remaining electrician job. App. 26-27. Respondents appealed and the Eighth Circuit, applying the decisions of this Court, reversed.

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### SUMMARY OF ARGUMENT

The questions presented challenge the Eighth Circuit's reversal of the trial court's flawed legal conclusions and clearly erroneous findings of fact. The petition should be denied because it presents no conflict of decisions among the circuits and presents no conflict with the decisions of this Court. Petitioner concedes that the Eighth Circuit's opinion raises no important or new issues of law and instead requests that review be granted so this Court can "*once again clarify*" the allocations of proof in a Title VII disparate treatment case and to correct errors by the court of appeals. There is no need for such clarification and the Eighth Circuit correctly applied well-established principles from this Court's decisions in *McDonnell Douglas*, and *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), to the trial court's mistaken legal analysis and clearly erroneous fact finding.

## ARGUMENT

### REASONS FOR DENYING THE WRIT

#### I. THE EIGHTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISION IN ANDERSON V. CITY OF BESSEMER

Petitioner asks this Court to review whether or not the Eighth Circuit paid "lip service" only to the clearly erroneous rule. Petitioner does not claim that the court of appeals was unaware of *Anderson* and *Pullman-Standard v. Swint*. App. at 10. The court of appeals acted well within its sphere and refrained from substituting its judgment as to disputed facts. Rather, petitioner's argument rests upon speculation concerning the possibility that the rule might have been avoided or erroneously applied. Neither assertion is supported by the record.

Petitioner concedes that the trial court erred in failing to find that respondents established a prima facie case. Petitioner's attempt to minimize the impact of such legal error on the trial court's fact finding is futile. As the Eighth Circuit stated:

When a district court erroneously fails to recognize a prima facie case under Title VII, a reviewing court cannot be certain whether this legal error colored the factual findings favoring the defendant. . . . In this case, the trial court's failure to recognize the plaintiffs' prima facie case left the court to consider only the defendant's evidence of what it claimed were the nondiscriminatory reasons for discharging the plaintiffs.

App. at 9 (cite omitted).

Petitioner makes much of the trial court's finding that respondents' testimony lacked credibility. Pet. Br.

at 22. A factual finding based on demeanor is not immune from appellate review. *Anderson*, 470 U.S. at 575 (“the trial judge may [not] insulate his findings from review by denominating them credibility determinations”). Where, as here, a court of appeals has documentary evidence, other testimony and finds inconsistencies in defendant’s story, it “may well find clear error even in a finding purportedly based on a credibility determination.” *Id.* at 575.

In light of these considerations, *Anderson* was properly applied. Petitioner’s disagreement with the Eighth Circuit’s finding in favor of respondents does not warrant review by this Court. *United States v. Johnston*, 268 U.S. 220, 227 (1925) “We do not grant a certiorari to review evidence and discuss specific facts.”); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (“The jurisdiction [of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.”)

## **II. THE EIGHTH CIRCUIT CORRECTLY HELD THAT RESPONDENTS ESTABLISHED A PRIMA FACIE CASE AND THAT RULING IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS**

Holding that respondents established a prima facie disparate treatment case, the Eighth Circuit correctly applied *McDonnell Douglas* to the facts in this case. The

trial court's failure to find a *prima facie* case because respondents were unqualified<sup>4</sup> was reversible error.

The record simply does not support the trial court's finding that "neither of the plaintiffs was qualified for the remaining journeyman electrician position." App. at 26. Respondents were certified electricians and possessed years of experience. Further, respondents' direct supervisors, Pree and Bankston, testified that they were qualified for the remaining electrician position. Pree, who regularly evaluated respondents, also testified that nothing in the work records would have caused him to not recommend respondents for the position given to Cummings. Records indicate that both respondents received satisfactory evaluations.

The trial court ignored this substantial body of objective evidence that respondents were qualified in favor of "subjective evidence" that led the court to conclude that respondents were undependable. The court of appeals was correct in rejecting this evidence at the *prima facie* stage:

For the purposes of establishing a *prima facie* case, the plaintiffs need only show their objective qualifications for the job. . . . Here, the plaintiffs proved by a preponderance of the evidence that they were experienced, journeyman electricians, and UAPB does not dispute this. . . . This is all that is required at the *prima facie* stage.

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<sup>4</sup>The trial court's legal conclusion that respondents failed to establish a *prima facie* disparate treatment case because they were not "minorities" at UAPB was also erroneous (App. at 26) and correctly reversed by the court of appeals. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 278-79 (1976).

App. at 8 (citing *Lynn v. Regents of University of California*, 656 F.2d 1337, 1344-45 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982) and *Davis v. Califano*, 613 F.2d 957, 964 (D.C. Cir. 1979)).

In light of this evidence, the trial court erred when it failed to find that respondents had met their initial burden under *McDonnell Douglas*. The court of appeals' decision to reverse on this ground was correct and is consistent with the decisions of this Court and the decisions of the circuits. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 719 (1983) ("we cannot be certain that its findings of fact in favor of the Postal Service were not influenced by its mistaken view of the law."); *Pollard v. Rea Magnet Wire Company, Inc.*, 824 F.2d 557, 560 (7th Cir. 1987) (prima facie case found, but court of appeals reverses trial court's finding in favor of plaintiff as clearly erroneous).

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## CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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April, 1988.